

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned On Briefs November 16, 2009

GMAC, LLC v. JAMES V. KIMBRO

Direct Appeal from the Circuit Court for Williamson County

No. 08450 Robbie T. Beal, Judge

No. M2009-00177-COA-R3-CV - Filed December 23, 2009

The Defendant/Appellant appeals from the trial court's grant of the Plaintiff/Appellee's motion for summary judgment which was supported by affidavit and a statement of undisputed material facts. The Defendant/Appellant failed to respond to either. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the Court, in which HOLLY M. KIRBY, J. and J. STEVEN STAFFORD, J., joined.

James V. Kimbro, *Pro Se*.

Charles D. Waller, Knoxville, Tennessee, for the appellee, GMAC, LLC.

OPINION

This matter originated in the General Sessions Court for Williamson County wherein the Plaintiff, GMAC, LLC, sued Defendant James V. Kimbro for default on a contract. GMAC was awarded judgment in the amount of \$20,795.46 and costs following a trial of this matter and Mr. Kimbro perfected an appeal to circuit court.

It is undisputed that Mr. Kimbro entered into a contract with Franklin Pontiac Buick GMC, Inc. on October 30, 2006, for the purchase of an automobile. The contract was assigned to GMAC and Mr. Kimbro breached the contract by failing to make the necessary payments as agreed upon. GMAC filed a motion for summary judgment with a supporting affidavit as well as a statement of undisputed material facts. Mr. Kimbro responded to

neither. The motion was granted and judgment was entered against Mr. Kimbro in the sum of \$20,795.46 and the costs of the cause were taxed to him. Mr. Kimbro then perfected an appeal to this Court.

Issue

Notwithstanding the requirements of Tenn. R. App. P. 27(a)(4), Appellant's brief does not contain a statement of the issues presented for review. However, the Court recognizes that he is appearing *Pro Se* and we glean from the argument that he contends that GMAC failed to send him notification of disposition as required by Tennessee Code Annotated section 47-9-611(b).

Standard of Review

Our supreme court recently set forth a standard of review for summary judgment proceedings in *Hannan v. Alltel Publishing, Co.*, 270 S.W.3d 1, 5 (Tenn. 2008), as follows:

Summary judgment is appropriate when the moving party can show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). In *Byrd*, this Court set out the basic principles involved in determining whether a motion for summary judgment should be granted. The moving party has the ultimate burden of persuading the court that "there are no disputed, material facts creating a genuine issue for trial . . . and that he is entitled to judgment as a matter of law." *Byrd*, 847 S.W.2d at 215. If the moving party makes a properly supported motion, the burden of production then shifts to the nonmoving party to show that a genuine issue of material fact exists. *Id.* To meet its burden of production and shift the burden to the nonmoving party, the moving party must either affirmatively negate an essential element of the nonmoving party's claim or establish an affirmative defense. *Id.* at 215 n.5. If the moving party does not satisfy its initial burden of production, the court should dismiss the motion for summary judgment. *See id.* at 215. Summary judgment should be granted only when, with the facts viewed in favor of the nonmoving party, it is clear that no genuine issue of material fact exists. *Id.* at 210-11.

Id. at 5.

Analysis

GMAC filed in support of its motion for summary judgment the affidavit of Lisette O'Neal identified as a portfolio coordinator for GMAC, LLC. The affidavit states as pertinent as follows:

GMAC keeps client/account records in the ordinary course of business. All entries into the files are made by persons under a business duty to record information into the file correctly and accurately at or about an event occurs of information is learned. [sic]

I am the custodian for the file of James V. Kimbro, Defendant in the above referenced matter.

The Defendants' file contains a Retail Installment Sale Contract dated October 30, 2006, between he and Franklin Pontiac Buick GMC, Inc. At 1413 Murfreesboro Road, Franklin Tennessee 37067 ("the Contract") for the purchase of a new Model Year 2006, Buick Lacrosse (the "Vehicle"). It is signed by the Defendant. A true and correct copy of the Contract is attached hereto as Exhibit A.

GMAC paid value for an assignment of the Contract.

Under the terms of the Contract, the Defendant was to make payments of Five Hundred Fifty-Dollars and Seventy-nine Cents (\$550.79) per month for a period of sixty (60) months.

The Defendant defaulted under the contract by failing to make the monthly payments called for therein.

According to the file, GMAC or its agents repossessed the vehicle or it was voluntarily surrendered on or about May 16, 2007. The vehicle had exterior damage that required repair before it could be sold which included the following: the hood had multiple dents that had to be repaired, the right headlight was broken and had to be replaced, right front fender had multiple dents and required repair, and the right headlamp mounting required repair. A true and correct copy of the Vehicle Inspection Report is attached hereto as Exhibit B. At the time of the repossession, the Defendant's account was three (3) months past due.

Following the repossession of the Vehicle, GMAC processed the vehicle in preparation for sale.

On or about May 18, 2007, GMAC sent a notice to the Defendant that the Vehicle would be sold at a private sale sometime after June 2, 2007, the date specified on the Notice. A true and correct copy of the Notices is attached hereto as Exhibit C.

The Defendant did not redeem the vehicle following the repossession.

On or about July 5, 2007, GMAC sold the vehicle at a private auction attended by dealers in Mt. Juliet, Tennessee. It is the common and standard practice for those in the vehicle finance industry to sell repossessed and surrendered vehicles via wholesale private auction attended by dealers and their representatives.

The Vehicle brought \$15,000.00 at the private auction. The net proceeds from the sale were applied to the balance owed by the Defendant. A true and correct copy of a Sales Inquiry report for this sale is attached hereto as Exhibit D.

The contract provides for the recovery of attorneys' fees in the event of default.

After all applicable credits are applied to the Defendant's account, GMAC is owed the principal balance of Eighteen Thousand Eighty-Three Dollars and One Cent (\$18,083.01). GMAC sent the Defendant an itemization of the deficiency and a demand for payment on or about July 14, 2007. A true and correct copy of the statement of sale is attached hereto as Exhibit E.

GMAC also filed Plaintiff's statement of undisputed material facts which basically tracks the information set forth in Ms. O'Neal's affidavit. As stated, Mr. Kimbro filed no responses. An adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but his/her response, by affidavit or otherwise, must set forth specific facts showing that there is a genuine issue for trial. Failing to do so, summary judgment, if appropriate, shall be entered against the adverse party. Tenn. R. Civ. P. 56.06. Furthermore, it does not appear that Mr. Kimbro raised the issue of failure to send notification in the court below. It is well settled that issues not raised in the trial court cannot be raised for the first time on appeal. *Barnes v. Barnes*, 193 S.W.3d 495, 501 (Tenn. 2006).

Conclusion

After reviewing this record we find no error on the part of the trial court in granting the motion for summary judgment and the judgment entered in the court below is affirmed. Costs of this cause are taxed to James V. Kimbro, for which execution may issue.

DAVID R. FARMER, JUDGE